IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JUAN FIGUEROA, Appellant.	)	No. 61729-0-I DIVISION ONE UNPUBLISHED OPINION FILED: July 6, 2009

AGID, J.—Juan Figueroa appeals his sentence for two counts of first degree child rape. He fled to Mexico midtrial and was convicted of two counts of first degree child rape and one count of first degree child molestation in absentia, but was later extradited and sentenced by the trial court on the rape convictions. He contends that by including the child molestation conviction in his offender score, the trial court violated the extradition treaty with Mexico that prohibited the State from punishing him for the child molestation conviction. Under the Sentencing Reform Act (SRA),[1] the court properly included the molestation conviction in the offender score as a current conviction. And under Washington law, the use of the molestation conviction as a basis for the sentence on the rape charge does not constitute punishment for the

[1] Chapter 9.94A RCW.

molestation charge. Thus, the court did not punish him for the molestation offense in violation of the treaty. Accordingly, we affirm.

FACTS

E.F. was a year old when her mother, Brigit McDevitt, married Juan Figueroa. McDevitt and Figueroa then had a daughter together, named Sophie. The couple eventually divorced, and Figueroa moved out of the home sometime in 2001.

In the fall of 2002, when E.F. was a high school junior, she disclosed to her mother that Figueroa had sexually abused her when she was nine years old. McDevitt then called Figueroa and told him she knew what he had done and that he was not welcome at her house. Figueroa did not respond and never came to the house or called again. E.F. was unwilling to report the incident to the police, but began seeing a therapist. The therapist ultimately contacted the police and reported the abuse.

The State charged Figueroa with two counts of first degree rape of a child and one count of first degree child molestation. The State alleged that during the period from January 1, 1995 through December 31, 1996, Figueroa raped and sexually molested E.F. on multiple occasions. The case went to trial on June 27, 2006.

At trial, E.F. testified that Figueroa began sexually abusing her in the summer before she entered fourth grade. She testified that he would enter the bedroom that she shared with Sophie, touch her on her chest and under her underwear, and sometimes put his fingers inside her. She also testified that sometimes he would expose his penis, put her hand on it, and move her hand. E.F. estimated that this happened about 20 times and that he put his fingers inside her about 10 of those times.

E.F. further testified that Figueroa physically abused her by hitting her in the head, pulling her hair, and even lifting her up by her hair. She also testified that he once threw a videotape at her that hit her in the face and left a big bruise. She also described Figueroa as "mean and scary" and said that he called her "retarded" and "stupid goat." She testified that at one point, she reported the physical abuse to a teacher and that Child Protective Services was called, but her mother and Figueroa denied everything and were furious with E.F. for telling people about their personal business. After this, Figueroa became increasingly physically abusive to E.F., strangling her on one occasion, and ripping the phone from the wall when she threatened to call the police. He also told her that no one would ever believe her if she reported the sexual abuse.

After E.F.'s testimony, the court adjourned for the day. The next day, Figueroa did not appear for trial. Defense counsel told the court that he received a call from Figueroa's sister, who said that her brother had not been home since yesterday evening and had left a note stating that he would not return for the rest of the trial. Defense counsel tried to contact Figueroa but was unsuccessful.

The prosecutor suggested a recess to secure Figueroa's presence, but defense counsel was concerned about delaying the trial because he had two witnesses that would be returning to California the next day. The court then took a brief recess for Figueroa's sister to appear. Figueroa's sister, Lilia, then appeared before the court, outside of the jury's presence. She brought the note Figueroa left, and the court read it into the record as follows:

> Dears: Judge, Jury, and Mr. Weston [counsel].

> I don't think I'm going to get a fair trial & I am too old and sick for being in prison. I believe the jury believe[d] everything the kids say without prove [sic].
>
> I cannot come back to trial because I think some members of the jury assume the worse [sic] of me. And being a minority judged by [A]nglos[,] I know I don't have a chance. This is my decision, and my decision only. I take full responsibility of my action.
>
> Sincer[e]ly, Juan Figueroa.

Lilia confirmed that this was her brother's handwriting and recognized his signature at the bottom of the letter. She told the court that she last saw him the night before when he said he was going out to get some air because he was not feeling well. The next morning when she awoke, he was not there.

The State then asked the court to make a finding that Figueroa was voluntarily absent from trial. Defense counsel moved for a mistrial. The court denied the mistrial motion and found that Figueroa voluntarily decided to absent himself from the rest of the trial.

The defense then put on its case. Lilia testified that she never saw Figueroa hit or yell at E.F. She also testified about his absence from trial, described him as devastated, and explained that he felt it was not fair for him to be in court, that it was his own choice not to be in court and that he took full responsibility for that decision. Figueroa's niece also testified that when she visited him in the summer of 2000, he was always working and went straight to bed when he came home from work. She further testified that she never saw him hit E.F. or Sophie. The jury found Figueroa guilty of both counts of first degree rape and the additional count of first degree child molestation.

A year later, on July 2, 2007, Figueroa was apprehended in Mexico. On

February 26, 2008, he was returned to the United States under the extradition treaty between the United States and Mexico. Mexico granted extradition for sentencing only on the two counts of first degree child rape; it denied extradition on the first degree molestation count because it fell outside the statute of limitations for the comparable crime in Mexico.

On April 25, 2008, Figueroa appeared before the court for sentencing. The trial court did not sentence him on the molestation count, but counted it in his offender score used to determine his sentence for the child rape convictions. For each child rape count, the court calculated his offender score as six, which included three points for the other child rape count and three points for the child molestation count. Figueroa had no other known criminal history. Based on this offender score, his standard range was 146 to 194 months. The trial court sentenced him to the top of the range and imposed 194 months on each count of child rape, to be served concurrently. The court also made the following finding: "[T]he defendant was also found guilty by jury verdict on Count III – Child Molestation in the First Degree Domestic Violence. The defendant is not being sentenced on this count by agreement between the United States of America and Mexico."

DISCUSSION

Figueroa argues for the first time on appeal that the trial court erred by including the molestation conviction in his offender score. A challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal.[2] Thus,

[2] State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999); State v. Roche, 75 Wn.

the issue is properly before us for review and we need not reach Figueroa's alternative argument that counsel's failure to object denied him effective assistance of counsel.

Article 17 of the 1978 Extradition Treaty between the United States and Mexico provides in relevant part: "[a] person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which extradition has been granted."[3] Under international law, the "'specialty doctrine'" prohibits the requesting State from prosecuting a person extradited to that State for an offense other than the ones for which extradition was granted.[4] Whether the trial court properly applied the doctrine of specialty is reviewed de novo.[5]

Here, according to the State's sentencing memorandum, the terms of Figueroa's extradition were as follows:

> The Government of Mexico granted the defendant's extradition to be sentenced on Counts I and II (rape of a child in the first degree) and **DENIED** extradition for the sentencing on Count III (child molestation in the first degree) on the premise that this charge violates Mexican statute of limitations for a comparable charge.[6]

Figueroa argues that while the trial court did not technically sentence him on the molestation conviction, it effectively punished him for it in violation of the treaty by using it to increase his offender score and consequently, his standard range, on the

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App. 500, 513, 878 P.2d 497 (1994).

[3] 31 U.S.T. 5059, 5071.

[4] State v. Pang, 132 Wn.2d 852, 902, 940 P.2d 1293, 948 P.2d 381, cert. denied, 522 U.S. 1029 (1997).

[5] See Yapp v. Reno, 26 F.3d 1562, 1565 (11th Cir. 1994) (treaty interpretation presents a question of law, subject to de novo review).

[6] There is no official extradition order in the record; both parties simply cite to the State's recitation of the extradition events in the State's sentencing memorandum.

rape conviction. He points out that if the molestation conviction was not counted in his offender score, his standard range would have been 102 to 136 months; thus, he argues, had that conviction not been included in his offender score, the top of his standard range would have been significantly less than the top of the range to which he was sentenced, which was 194 months.

Figueroa acknowledges that Washington courts have not addressed this precise issue, but that the Ninth Circuit has addressed a case involving the use of nonextraditable offenses in sentencing. In United States v. Lazarevich, the Ninth Circuit held that a sentencing court properly considered an uncharged offense as part of the defendant's criminal history, despite another country's refusal to extradite him for prosecution on that charge.[7] There, the United States sought to extradite the defendant from the Netherlands to face federal charges of kidnapping and passport fraud charges. But because he had already been tried and convicted on kidnapping charges in Belgrade, the Netherlands extradited him for prosecution on only the passport fraud charge.[8] When he was returned to the United States, he was tried and convicted of passport fraud, but the trial court imposed a sentence above the standard range based on a finding that he committed the crime to facilitate the additional crime of child abduction.[9] The court also considered as part of his criminal history the Belgrade conviction for child abduction.[10]

The defendant argued that by using the child abduction charges as a basis for

[7] 147 F.3d 1061 (9th Cir.), cert. denied, 525 U.S. 975 (1998).
[8] Id. at 1062-63.
[9] Id. at 1063.
[10] Id.

his sentence, the court was punishing him for that offense in violation of the treaty. The Ninth Circuit disagreed, holding that the "'use of evidence of related criminal conduct to enhance a defendant's sentence for a separate crime within the authorized statutory limits does not constitute punishment.'"[11] The court observed that such treaties are made "within an historical and precedential context" that includes "the long-standing practice of United States courts of considering relevant, uncharged evidence at sentencing."[12]

Figueroa contends that Lazarevich should not apply here because unlike the federal sentencing law applied in Lazarevich, Washington law does not have a long standing practice of considering relevant, uncharged evidence at sentencing to increase the standard range. Rather, he points out, under the SRA, only current and prior convictions increase the standard range,[13] and sentences imposed outside of the standard range must be based on information that is admitted, acknowledged, or proved at trial or at the time of sentencing.[14]

But as the prosecutor summed it up in oral argument, the problem with Figueroa's argument is that he fled just a little too late: he was already tried and convicted of the molestation offense in Washington *before* extradition. Thus, by including that conviction in his offender score, the court did not base Figueroa's sentence on uncharged unproven facts, as he contends. Rather, the court properly used the molestation offense, which was proved to a jury, as a current conviction to

[11] Id. at 1063-64 (quoting Witte v. U.S., 515 U.S. 389, 399, 115 S. Ct. 2199, 132 L. Ed. 2d 351 (1995)).
[12] Id. at 1064.
[13] See RCW 9.94A.510, .525.
[14] RCW 9.94A.530(2).

calculate his offender score for sentencing on the rape charge, as authorized by the SRA.

Figueroa also contends that Lazarevich is distinguishable because there, the defendant was already convicted of the nonextraditable offense in a foreign country and the Netherlands' concern in denying extradition was that he would be punished twice for the same crime. He argues that while "[t]he Dutch were concerned with a second conviction and punishment, not the initial one," Mexico's concern here was that he would be punished at all for a crime that was barred by its statute of limitations. But again, Figueroa's argument incorrectly implies that Mexico denied extradition for *prosecution* of that charge, when it denied extradition for sentencing only, acknowledging that Figueroa had already been tried and convicted of the molestation charge before extradition.[15] Thus, he was not being punished for a "new charge" in the United States, as Figueroa contends. Rather, the sentencing court simply used the molestation offense, of which he was already convicted, to increase his sentencing range and criminal history for his current child rape offense. As Figueora acknowledges, this is precisely what the court did in Lazarevich.

The question then becomes whether including the molestation conviction in the

[15] Figueroa asserts that no molestation conviction was entered on the judgment and sentence. But the judgment and sentence states:

> CURRENT OFFENSE(S): The defendant was found guilty on June 29, 2006 by jury verdict of (the defendant was also found guilty by jury verdict on Count III – Child Molestation in the First Degree Domestic Violence. The defendant is not being sentenced on this count by agreement between the United States of America and Mexico): [listing Counts I & II, rape of a child in the first degree].

Thus, contrary to Figueroa's assertion, the judgment and sentence states only that the defendant is not being *sentenced* on this count, not that there was no conviction on this count. The judgment and sentence also listed count III under "OTHER CURRENT CONVICTION(S)" used to calculate the offender score.

offender score, even though authorized by the SRA, amounts to "punishment" for the molestation conviction in violation of the extradition treaty. In Lazarevich, the court rejected the defendant's argument that he was being punished for the uncharged crime because it was used to increase his sentencing range.[16] In doing so, the court reiterated the United States Supreme Court's holding in Witte v. United States[17] that "'use of evidence of related criminal conduct to enhance a defendant's sentence for a separate crime within the authorized statutory limits does not constitute punishment.'"[18] The Lazarevich court also concluded that "[i]f the plain meaning of punishment is interpreted to preclude consideration of other criminal behavior in sentencing, that interpretation would seem to 'effect a result inconsistent with the intent' of at least the United States, given its long history of considering such conduct."[19] Similarly, here such an interpretation would be inconsistent with the intent of the SRA, which authorizes courts to base its sentences on an offender score that includes past and current convictions.

Additionally, as the State argues, Washington courts have recognized that the use of other convictions to increase a sentence does not constitute additional punishment for those convictions. While Figueroa is correct that most of the cases cited by the State deal with ex post facto claims, the concept of punishment in the ex post facto analysis is nonetheless instructive and relevant here.[20] Like Figueroa's

[16] 147 F.3d at 1063. Similarly, in U.S. v. Garrido-Santana, 360 F.3d 565, 578 (6th Cir.), cert. denied, 542 U.S. 945 (2004), the court concluded that a sentence enhancement based on a nonextraditable offense did not constitute "punishment" for that conduct and therefore did not violate any proscription against such punishment in the extradition treaty.

[17] 515 U.S. 389, 115 S. Ct. 2199, 132 L. Ed. 2d 351 (1995).

[18] 147 F.3d at 1063-64 (quoting Witt, 515 U.S. at 399).

[19] Id. at 1064.

argument, the thrust of the defendants' arguments in those cases was that allowing the court to use prior convictions to increase a sentence for a current conviction amounted to impermissibly punishing the defendant for the prior conviction.

For example, in In re Personal Restraint of Williams,[21] the defendant argued that the use of his pre-SRA convictions to calculate his sentence under the SRA for his current conviction violated the ex post facto clauses. The court rejected this argument, holding: "[T]he SRA does not increase punishment for the defendant's prior offenses; rather, it calculates his sentence for his post-SRA convictions only."[22] Similarly, in State v. Nordlund,[23] the court rejected the defendant's argument that finding him a persistent offender under the Persistent Offender Accountability Act (POAA) based on pre-POAA prior sex offenses violated the ex post facto clause. As the court concluded:

> As with the use of his other prior convictions to calculate his offender score under the SRA, the use of these convictions to determine the POAA's application does not increase the punishment for his prior strikes; rather, the prior strikes are used only to calculate his current sentence for his post-POAA convictions.[24]

Additionally, in State v. Randle, the court rejected the defendant's argument that mandatory use of juvenile convictions to determine adult sentences under the SRA violated the ex post facto clause because the use of juvenile convictions in adult sentences was discretionary under pre-SRA law.[25] The court rejected the defendant's

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[20] See also Garrido-Santana, 360 F.3d at 578 (recognizing that the underlying analytical foundation of double jeopardy and its concept of punishment are instructive in an extradition case that does not involve a double jeopardy claim).

[21] 111 Wn.2d 353, 363, 759 P.2d 436 (1988).

[22] Id.

[23] 113 Wn. App. 171, 53 P.3d 520 (2002), review denied, 149 Wn.2d 1005 (2003).

[24] Id. at 193.

[25] 47 Wn. App. 232, 240, 734 P.2d 51 (1987), review denied, 110 Wn.2d 1008 (1988).

"flawed premise" that he was being punished anew for prior behavior:

> Randle's ex post fact claims rest on a flawed premise: that the use of juvenile offenses to determine or enhance sentences for subsequent adult crimes constitutes additional punishment for the prior conduct. It is well established, however, that any enhanced penalty in such circumstances is imposed solely for the last crime, even though prior offenses are taken into account.[26]

Applying this same reasoning here, the trial court's use of the child molestation conviction to calculate Figueroa's offender score and standard range sentence on the child rape convictions does not constitute punishment for the child molestation conviction. Rather, it was used to calculate his current sentence on the rape convictions for which extradition was granted. Thus, any enhanced penalty in such circumstances is imposed solely for the last crime. Under the SRA's sentencing scheme, prior offenses must be taken into account. One purpose of that scheme is to punish the offender for recidivism. The trial court did not sentence or punish Figueroa for the molestation charge in violation of the treaty.

Finally, we find no merit to any of the arguments Figueroa raises in his Statement of Additional Grounds. Figueroa first contends that the prosecutor committed misconduct by inducing his sister Lilia to give false testimony about his absence from the trial. While not altogether clear, his argument appears to be that the prosecutor took advantage of the language barrier during cross-examination of Lilia and asked her leading and confusing questions designed to make her testify falsely. He asserts that she falsely testified that she spoke with him the night before and that he told her he knew he had to appear in court the next day but decided that he was not

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[26] Id. at 241.

going to go to the trial. Figueroa contends that in fact she never spoke with him at all about this, but that she only knew he was not going to appear when she found the note the next day. He argues that this testimony was prejudicial because it led the jury to believe he did not appear at trial because he was guilty of the crimes.

To establish prosecutorial misconduct, the defendant must show that the prosecutor's conduct "was both improper and prejudicial in the context of the entire record and circumstances at trial."[27] The defendant bears the burden of showing both that the conduct was improper and that it caused prejudice.[28]

Figueroa fails to demonstrate that the prosecutor's questioning amounted to misconduct. The prosecutor did not induce Lilia to give false testimony nor did she falsely testify. The prosecutor asked her whether Figueroa indicated to her in "his own words" that he did not want to be in court that day and whether he indicated that it was his choice not to be there and that he took full responsibility for not being there. She responded that he "communicated" to her that it was not fair for him to be here, that he indicated it was his choice not to be there, and he took full responsibility for not being there. While she testified to the court earlier that Figueroa did not directly speak to her about this, her answers to the prosecutor's questions were consistent with the note she found that was signed by Figueroa and stated his intentions and reasons for not appearing in court. Figueroa points to nothing in the record that disputes these facts. Thus, she testified truthfully that he "communicated" this information to her even though the communication was through the note. The prosecutorial misconduct claim is

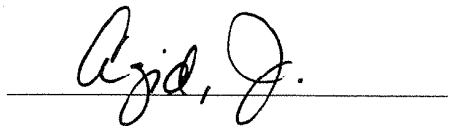
[27] State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003), review denied, 151 Wn.2d 1039 (2004).

[28] Id.

without basis.

Figueroa also contends that the trial court erred by failing to give a limiting instructions and counsel was ineffective for failing to request them. He asserts that defense counsel made 14 objections throughout the trial, but the court "never gave the Jury any indication of what they should do, whether it be disregard [sic] what they heard or limit its effect." But because he does not identify either the objections or the alleged objectionable evidence, we cannot determine whether a limiting instruction was necessary.

We affirm the judgment and sentence.



WE CONCUR: